

IN THE MATTER OF MERCHANT SEAMAN'S DOCUMENTS NO. Z-1111695 AND ALL
Issued to: George Wret

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1582

George Wret

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 21 April 1966, an Examiner of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman documents for 3 months outright plus 3 months on 12 months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a messman on board the United States SS EVANTHIE under authority of the document above described, on or about 24 February 1966, Appellant wrongfully engaged in mutual combat with a ship's officer, one Porter Bodine, the second assistant engineer.

At the hearing, Appellant was represented by non-professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of the second assistant and of the chief engineer, as well as records from the shipping articles and from the official log book.

In defense, Appellant offered in evidence testimony from a wiper and from the chief officer of the vessel at the time in question. A statement of Appellant had already been admitted into evidence along with the official log book record.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specification had been proved. The Examiner then served a written order on Appellant suspending all documents issued to him for a period of 3 months outright plus 3 months on 12 months' probation.

The entire decision was served on 11 April 1966. Appeal was timely filed on 5 May 1966. Appeal was perfected on 18 July 1966.

FINDINGS OF FACT

On 24 February 1966, Appellant was serving as a messman on board the United States SS EVANTHIE and acting under authority of his document while the ship was at sea.

At the morning meal on that date, Appellant, for the second time, moved the place of the second assistant to a different table. Annoyed, the second assistant complained to his chief. The chief engineer approached the steward and the messman about this.

About 11:00, the second assistant, in his room, heard Appellant and the chief engineer in the passageway discussing the matter. Appellant was speaking in a loud voice and accusing the second of being a troublemaker. The second entered the passageway and profanely called the Appellant a liar.

There was an exchange of foul language. Beyond this point I cannot and will not make further findings of fact upon this record. There is evidence as to other events which will be discussed in "opinion".

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant first contends that the action of his counsel is not permitting him to testify in his own behalf was prejudicial.

Secondly, he urges a disparity in treatment of himself and of the other party to the mutual combat, a licensed officer. Appellant's document was ordered suspended for three months, while the other party was given probation for a two months suspension.

Third, Appellant argues that a signed statement that he made should be considered as if made under oath and accorded due weight.

APPEARANCE: Appellant, Pro se

OPINION

I

Appellant's claim to have been prejudiced by his counsel's failure to have him testify cannot be considered.

He was adequately advised of his right to testify both at the beginning and end of the hearing, and the choice not to testify must be considered his.

The other bases for appeal need not be considered at this time.

II

The principal witness against Appellant was the second assistant engineer, Porter Bodine.

He testified that he was struck on the back of his head, from behind, with a heavy coffee cup. Then, beginning at line 20, R-11, and continuing to line 15, R-12, he described vividly his struggle with Appellant, his fear of the broken cup, and so forth.

Thus, it was a surprise to read in Bodine's written statement, made apparently on the date of the occurrence and entered in evidence as part of Investigating Officer's Exhibit 2, the following:

"I turned by back on him and went back toward my room." "The messman hit me back of the head with a coffee cup. I do not remember anything subsequent to this until later when the chief mate gave me first aid."

The examiner did not discuss in his decision the absolute contradiction between the sworn testimony of the witness at the hearing and his earlier contemporaneous disclaimer of recollection.

The reason why is obvious. The Examiner did not read the documentary evidence before making his findings.

Exhibit 2 was admitted into evidence at R-22. The Examiner said,

"This will be Government's Exhibit number two. I won't read it at this time though, however, it is in evidence."

The record shows that the hearing proceeded from that point to findings without further reference to the exhibit.

An examiner may evaluate the effect of a documentary exhibit; he may not ignore it or fail to read it.

Under certain circumstances a remand would be appropriate for the Examiner to correct this error. But on the whole record here, and on the matter of which I take official notice, I find that no useful purpose would be served in so doing in this case.

I cannot conceive that the discrepancy could be resolved by the trier of facts without an explanation from Bodine, and I cannot imagine any explanation that would convince me that the testimony at the hearing was true while the original statement was false.

Also, I take official notice that Bodine was found by this same Examiner to have committed assault and battery on Appellant, in another proceeding. If the Examiner's findings are correct in that proceeding, it is obvious that Bodine's testimony against Appellant was not consonant with his oath. His testimony against Appellant at the hearing admits to no more than legitimate self-defense.

Therefore, I reject completely the testimony of this witness given at the hearing, and I point out that his written statement cannot be true because if he had no recollection of anything after being

struck on the back of the head from behind, he could not have known as a fact that the was hit with a coffee cup.

III

I realize that there is testimony of another witness against Appellant which, on its face, tends to prove that Appellant struck Bodine with a coffee cup. This is the testimony of the Chief engineer.

He states that he left the place where Appellant and Bodine were engaged in profane argument to go to his room because he had heard his telephone ring. Entering his room, he fortuitously looked back to detect Appellant in the act of bringing his coffee cup down on Bodine's unsuspecting head. He felt that it was no concern of his that an assault and battery was being committed upon one of his assistants, and proceeded to answer the telephone.

The record is silent as to what, if anything, he did after that. The Examiner was incredulous of this testimony. The chief engineer explained his attitude by stating that his business was to run the engine room and not to preserve law and order on the ship.

I, too, am incredulous of this testimony and of the purported explanation. This same chief engineer who found it none of his business when an assistant was assaulted and battered before his very eyes is the one who took it upon himself to go first to the steward upon a minor complaint from the assistant about seating and then to the offending messman himself.

Such solicitude for the seating of one of his officers at breakfast is the mark of a man whose concept of duty goes beyond the mere running of the engine room. I am convinced, no matter what he says, that such a chief engineer would not ignore an assault and battery upon the misseated officer. Thus, I am convinced that he did not see an assault and battery.

IV

There remains no reliable, probative evidence as to any offense by Appellant, but I must note two other things.

The first is that the Examiner, in failing to read Exhibit 2, failed also to consider the statement of Appellant contained therein. While it is no longer of critical significance, because of the failure of the case against Appellant, this unsworn statement, coupled with the evidence of another witness, a wiper, concerning a crescent wrench in the hands of Bodine, gives, I think, a better picture of what happened.

V

There is one other glaring error in the handling of this case correction of which is not needed now but which I am constrained to comment upon for the guidance of investigators. Appellant was

charged with "engaging in mutual combat."

"Mutual combat" is properly alleged when investigation has indicated voluntary participation by two persons in a "fight". It may also be properly alleged in a case in which the circumstances afford no reliable information as to how a combat began but other evidence points to voluntary participation after the "fight" had begun.

"Mutual combat" can be properly found, after hearing, as lesser than a charged assault and battery.

The disconcerting thing in this case is that when the Investigating Officer made his opening statement and came to the point where he was to declare what he intended to prove, he said:

"I intend to show that Mr. Wret assaulted the second engineer, and additionally battered the second assistant engineer, and further engaged in mutual combat with the second assistant engineer." (R-7, 8)

I cannot fathom why Appellant was not so charged. I must also note that not one piece of evidence submitted by the Investigating Officer tended to prove that, apart from the alleged assault and battery, Appellant "further engaged in mutual combat with the second assistant engineer."

CONCLUSION

I conclude that there is no reliable, probative evidence in this record to support an allegation that Appellant engaged in mutual combat with another.

ORDER

The order of the Examiner entered at Long Beach, California, on 21 April 1966, is VACATED. Charges are DISMISSED.

P. E. TRIMBLE
Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D. C., this 2nd day of September 1966.

INDEX

Assault (including battery)
 mutual combat charged
 mutual combat, when chargeable

Charges and specifications
 lesser offense charged

Counsel
 advice not to testify

Evidence
 documentary, to be read by examiner
 failure to consider
 prior inconsistent statement

Examiners
/T duty to read documentary evidence
 failure to consider documentary evidence

Findings as to credibility
 rejected on appeal

Impeachment of witness
 prior inconsistent statement

Investigating Officer
 opening statement inconsistent with charge

Log entries
 duty of examiner to read

Official notice
 disposition of another case, on review

Remand
 when not appropriate

Testimony
 discrepancies, major, effect of

Witnesses

credibility of, evaluated on appeal
prior inconsistent statement